BANK BUMIPUTRA MALAYSIA BHD.

v.

MAHMUD HJ. MOHAMED DIN & ANOR.

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[ORIGINATING SUMMONS NO. 31-1642-86]
4 OCTOBER 1988

LAND LAW: *Charge to secure money lent - Non-payment - Application for order of sale - Notice of default in form 16D - Whether defective - Section 340 of the National Land Code - The issue of a prior equitable interest.*

The plaintiff as chargee of 5 pieces of land applied to the Court for an order of sale. Before the hearing of the originating summons, the intervener applied and was allowed to intervene in the proceedings on the ground that she was a purchaser of one of the 5 pieces of land.

Held:

[1] The statutory notice of default under s. 254 of the National Land Code was enacted with the object of giving sufficient notice to the chargor before an order of sale by public auction is applied for. Any deviation in form which had no substantial effect did not invalidate the statutory notice of default.

[2] Although the intervener obtained an equitable interest prior to the registration of the charge, the chargee being a registered chargee, had an indefeasible title against the world save for a few exceptions as set out in s. 340 of the National Land Code.

[Order granted in terms of the application of the plaintiff.]

Cases referred to:
Jacob v. Overseas Chinese Banking Corpn. [1974] 2 MLJ 161
Tan Kai Kok v. Thor Theik Seng [1935] MLJ 91
Ong Chat Pang v. Valliappa Chettiar [1971] 1 MLJ 224

Legislation referred to:
Interpretation Act 1967, s. 26
National Land Code 1965, ss. 254, 340

For the plaintiff - Lalchand Nathermal; M/s. Lalchand, Nawawi, Phang & Co.
For the defendant - Mohd Shahrom Mohamad; M/s. Zaid Ibrahim & Co.
For the intervener - Hira Singh; M/s. Asbir, Hira Singh & Co.

JUDGMENT

Peh Swee Chin J:

In this case, the plaintiff, (hereinafter called the chargee), chargee of 5 pieces of land described in this originating summons, applied to the Court for an order that the same be sold by public auction and for other consequential orders and directions. The defendant (hereinafter called the chargor), opposed the same. Before the hearing of the originating summons herein, the intervener, applied and was allowed to intervene in the proceedings on the ground that she was a purchaser of one of the 5 pieces of land in respect of which an order for sale by public auction was being sought by the chargee.

In the result, the chargee's claim was granted in terms of the originating summons over the objections of both the chargor and intervener. Only the intervener has now appealed and I will now give my grounds of judgment only with regard and specific reference to the points raised by the intervener's Counsel before me.

The first point taken was that the statutory notice of default in form 16D issued under s. 254 of National Land Code was defective because though it, *inter alia*, mentioned that the breach of a provision of the charge had continued for a period of 7 days prior to the date of the said statutory notice of default, such breach in fact had continued, not for a full 7 days but for a period of about 6 days or a period short of 7 days. This came about because the solicitors' notice of demand was dated 11 July 1986 and the said notice of demand itself gave 14 days' time from 11 July 1986 to repay on demand the sum in question. Such 14 days would expire, according to Counsel, on 25 July 1986, a date on which the breach of the provision to pay on demand began, and since the said statutory notice of default bore the date of 1 August 1986, the breach had continued for just less than 7 days before the issue of the statutory notice of default. Such an argument was, of course, extremely legalistic in the circumstances.

It must be borne in mind, when considering this argument, that the money lent in the instant case was expressly made repayable on demand. The statutory notice of default must have been enacted with the object of giving sufficient notice to a chargor before an order of sale by public auction is applied for. Please see the case of *Jacob v. Overseas Chinese Banking Corpn.* [1974] 2 MLJ 161. In my view, such an object was patently complied with in regard to the sum which was repayable on mere demand on the facts above. The learned Lord President Suffian, in giving judgment in *Jacob's* case, also referred to s. 26 of the Interpretation Act 1967 about any deviation in form which had no substantial effect, not invalidating the statutory notice of default therein. I respectfully adopt the same argument as after all the minor irregularity complained of did not go to the roots of the chargee's rights. Please see the case of *Tan Kai Kok v. Thor Theik Seng* [1935] MLJ 91.

The second point raised briefly by the intervener was that she signed the sale agreement in respect of one of 5 pieces of land as purchaser together with the chargor as vendor on 19 June 1980 while the new charge in connection with her piece of land, was created and registered by the chargee in 1983. She was an innocent purchaser for value and the title of her land did not bear the endorsement of any charge when she bought it.

Before I comment on the submission stated above, I shall like to make it clear that though facts of any given case may sometimes give rise to all sorts of speculative issues, however at the end of the day, it is only the issues, whether on questions of law or fact, which are specifically and actually raised or pleaded that invite the adjudication by the Court which cannot go outside the pleadings or statements in the nature of pleadings.

It was with this attitude that the Court's manner of dealing with the aforesaid submission ought to be reviewed.

It was only too obvious to the Court that the ground of the intervener's claim was one of priority over the charge in question as registered on the title which she had agreed to purchase by the sale agreement, because she had bought the land long before the charge was registered, in other words, *qui prior est tempore, potior est jure*, i.e. he who is earlier in time is stronger in law.

Here, the chargee, being a registered chargee, had attained, as regards its registered interest, an indefeasible title against the world save for a few exceptions as set out in s. 340 of the National Land Code such as fraud, misrepresentation etc. to which the chargee was a party or privy, and which did not apply to the facts of the instant case.

When the exceptions in the said s. 340 do not apply as they did not apply to the instant case, the supervening title would defeat a prior equitable right or interest. Please see *Ong Chat Pang v. Valliappa Chettiar* [1971] 1 MLJ 224. The chargee, to quote a familiar expression, had therefore succeeded in the scramble to get on the register and had therefore emerged victorious.

The second point of objection therefore had no merit also.

In the circumstances, the intervener had failed to show cause to this Court why the charged land in question should not be sold by public auction. I therefore made the order of sale by public auction and other consequential orders or directions as prayed with costs to the chargee/plaintiff.

Also found at [1989] 1 CLJ 1048